There is considerable confusion attaching to the statement quoted. If what is meant by the Court is the variation of the third situation, of which we have spoken, we concede to its soundness with all readiness. The quotation, when dissected, may, however, with equal aptitude meet the second state of facts. There is no particular magic in the words "mutual mistake," for they simply mean that the agent acted honestly thinking he had authority from his principal, while the plaintiff contracted with him, likewise believing he had authority—in other words we may call it a mutual mistake, or whatever appellation we wish, but that does not make it any the less the second situation. In short if it be simply the second proposition clad in new garments, it is, with due deference to the Court, a doctrine the boldness of which is somewhat startling, for it is a decided leap from the sound trend of authority, and militates against the well-recognized rule of *Collins* v. *Wright*.[15]

MALICE IN CONDITIONALLY PRIVILEGED COMMUNICATIONS.

What is a privileged occasion and what is a proper use of such occasion is decided differently in England from the general authority in America. This difference may perhaps be due to the long continued struggle for the right of freedom of speech and the late recognition of the middle and lower classes. England restricts the privileged occasion,[1] but is liberal in the use[2] of such occasion; while in this country, the occasion[3] is more broadly construed and its use[4] restricted. This difference has been overlooked by some jurisdictions which adhere to the American rule as to the occasion but have followed the English rule as to its use.

The recent case of *Barry* v. *McCollom*[5] follows this English rule as to the use and holds that, "it is enough if he honestly and in good faith, at the time when he made the accusations believed them to be true. This required nothing more than that there were grounds for the belief which then seemed to him to be sufficient and that his motive in making the publication was

---

[15] 8 E. & B. 645 (1857).

[1] Odgers on Libel and Slander (4th ed.), 248, 272, 282.

[2] *Clark* v. *Molineux*, 3 Q. B. D. 246 (1877).

[3] Townshend on Slander and Libel, 395, 414, 419.

[4] 18 Amer. & Eng. Enc. 1048; 25 Cyc. 411.

[5] 70 Atl. (Conn.) 1035.

an honest desire to discharge the duties of his office with fidelity."

It is established in England that "honest" belief is all that is necessary where the use is in "good faith." [6] Stupidity, obstinancy, or reasonableness of the belief are not considered.[7] There are some cases which appear to hold that there must be some grounds for the assertion; that they should not be made wantonly or recklessly; and that they must be warranted by some circumstances reasonably arousing suspicion.[8] In slander to title [9] and accusations against public officers,[10] reasonable and probable cause appear to be necessary. This English rule obtains in New York, New Jersey, Wisconsin, Virginia, and other states.[11]

The so-called "Pennsylvania rule" [12] that libel and slander are governed by the same rules as malicious prosecution, requiring reasonable and probable cause for the belief, is followed by the majority of jurisdictions in this country.[13] A false assertion, manifestly injurious to the rights of another, is generally ground for a cause of action except where public policy has denied such right. For the protection of society, an absolute right to accuse before a public judicial officer has been granted, and malice is immaterial. It was found that the protection of private interests sometimes required that accusations be made; and from this grew the conditional privilege. With the development of our elective system and the increased association of individuals for social, professional, or business reasons, the scope of an interest common to two or more widened and the conditional privilege increased more in America than in England.

Broad general principles of law should, when possible, control the question; what is and has been primarily a tort should be treated and controlled as such; special rules for particular kinds of torts should be avoided if possible. Reasonable and probable cause, care, or prudence have always been the criteria

---

[6] *Clark* v. *Molineux, supra.*

[7] *Pater* v. *Baker,* 3 C. B. 860 (1847); *Hesketh* v. *Brindle,* 4 T. L. R. 199 (1888).

[8] Odgers, 340, 342.

[9] *Leslie* v. *Cave,* 3 T. L. R. 584 (1887).

[10] Odgers, 342; *Howard* v. *Thompson,* 21 Wend. 319 (1839).

[11] 18 Amer. & Eng.. Enc. 1048.

[12] *Briggs* v. *Garrett,* 111 Pa. 404 (1836); *White* v. *Nicholls,* 3 How. 267 (1845).

[13] Newell on Libel and Slander, 476, *et seq.*

in the exercise of the right to do injury to another. "Good faith," "honesty," and *"bona fides"* are not generally any justification for a direct and intended injury to the personal or property rights of another. Unless imperative public policy demands such freedom of speech or press, it should not be any justification in the case of libel or slander. It is difficult to discover, in this country at least, the public policy which demands that the honest belief and good faith of one who has not based such belief on reasonable and probable cause, or due care, should be permitted to deprive the teacher, or other professional person, of the means of following his calling, the business man of continuing his business, the public candidate of living among his fellows with respect, or the servant of the opportunity of employment.

Mr. Justice Holmes has well said,[14] "Good faith is not a sufficient answer for a libel. One publishes libellous matter at his peril. Its liability is the usual liability in tort for the natural consequences of a manifestly injurious act. Reasonable cause is no justification where there is no privilege." Though the statement made in deceit is not a manifest or intended injury to the plaintiff, yet many jurisdictions hold that the defendant must have reasonable and probable cause for the belief in the assertion made; good faith is not enough. Even accidental injuries are actionable unless the person causing the injury be free from all fault. Carelessness which causes an injury is generally sufficient foundation for an action. But a person may through carelessness or negligence commit a wrongful act, and honestly think or believe he is doing no wrong. In order to clear himself from the imputation of carelessness, he should show not only that he acted in an honest belief that the story communicated by him was true; but also that there were reasonable grounds to induce such belief. "Honest belief" should be founded on reasonable and probable cause.[15]

Lindley, J.,[16] in affirming a decision of Jessel, J.,[17] held: "An action for slander to title will not lie unless the statements made by the defendant were not only untrue, but also were made without what is ordinarily expressed as reasonable and probable cause; and the rule applies not only to actions for slander to title, strictly and properly so called, with reference to real

---

[14] *Burt* v. *Advertiser,* 154 Mass. 242 (1891).

[15] *Holmes* v. *Clisley,* 121 Ga. 246 (1904); *Toothaker* v. *Conant,* 91 Me. 439 (1898).

[16] *Halsley* v. *Brotherhood,* 19 Ch. D. 386 (1881).

[17] 15 Ch. D. 579.

estate, but also to cases relating to personalty or personal rights or privileges." Mere lies are not privileged and in the absence of reasonable and probable cause, *scienter* should be presumed.[18]

It is submitted that for a communication to be privileged it must be made on a proper occasion, from a proper motive, and must be based upon a reasonable and probable cause. Even under the English rule the instructions to the jury frequently go to this extent.[19]

WHEN THE IMITATION OF ONE MAN'S GOODS BY ANOTHER TRANSGRESSES THE RULE AGAINST UNFAIR TRADE COMPETITION.

The law of unfair trade competition has been unnecessarily confused by not keeping it distinct from the law of trade marks. Thus it is common legal knowledge that one cannot acquire a trade mark in the mere shape of an article,[1] but clearly this does not say because the unfair trade competition is by means of the similarity in shape of defendant's to complainant's article, that it should not be restrained.[2] Following out the trade mark idea, however, there are decisions holding that there can be no unfair trade competition in copying the structural advantages of another's product, irrespective of the intent to deceive the public,[3] while other decisions reasoned solely along the lines of unfair trade competition come to the opposite conclusion on the same statement of facts.[4]

This confusion also explains certain opinions that have been expressed "that there seems to be a strong tendency to-day to admit that an exclusive right may be acquired in certain distinguishing devices, which would have been held some years ago to be non-exclusive marks and open to all the world."[5] The cases cited as so holding are cases where "the principles of unfair trade competition rather than those appertaining to trade marks were the bases of judgment."[6]

---

[18] *Briggs v. Garrett, supra.*

[19] *Regal* v. *Perkinson,* 1 Q. B. D. 431 (1892).

[1] *Moorman* v. *Hoge,* 2 Sawyer 78 (C. C. A. 1871).

[2] *Coates* v. *Merrick Thread Co.,* 149 U. S. 562 (1892).

[3] *Globe-Wernicke Co.* v. *Fred. Macey Co.,* 119 Fed. 696 (C. C. A. 1902).

[4] *Cook* v. *Bernheimer,* 73 Fed. 203 (Circ. Crt. 1896).

[5] See article. "Fraud as an Element of Unfair Competition," 16 Harv. L. Rev. 272, at p. 274.

[6] A Treatise on the Law of Trade-marks, by W. H. Browne, 2nd ed., sec. 89c.